

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

OCT 09 1998

IN THE MATTER OF:

DOCKET NUMBER: 97-02382

COUNSEL: NONE

HEARING DESIRED: NO

APPLICANT REQUESTS THAT:

1. He be promoted to the grade of master sergeant (**E-7**) with a date of rank (DOR) prior to his retirement on 31 May 1995.
2. The Article 15, Uniform Code of Military Justice, (UCMJ), imposed on 3 March 1992, be set aside and removed from his records.

APPLICANT CONTENDS THAT:

The testing opportunity, when he was considered supplementally for promotion to the grade of master sergeant, was not fair, equitable, or in his best interest. He states that he was not provided sufficient study time before being required to test for the supplemental consideration.

With regard to his request for set-aside of the Article 15 action, applicant disputes that the validity of a mortgage debt, upon which the Article 15, dated 3 March 1992, charge of dishonorably failing to pay a debt is founded, was not disputed. He contends that his commander, while conducting the investigation of the offense, denied the applicant his rights afforded him under Article 31 of the UCMJ. Applicant states that the situation that brought about the financial irresponsibility was a direct result of his commander refusing to use his discretion to resolve the injustice which created a situation where the applicant had to prove that the commander was unfair, unjust and not with legal merit.

Applicant's complete submission is attached at Exhibit A.

STATEMENT OF FACTS:

Applicant enlisted in the Regular Air Force on 14 May 1975 for a period of six years.

In a previous action by the AFBCMR, the Board directed that an Enlisted Performance Report (EPR), for the period ending 20 May 1992 be declared void and removed from his records; that the suspended reduction issued by nonjudicial punishment on 3 March 1992 was not vacated on 1 July 1992 but on that date he continued to serve in the grade of technical sergeant with an effective date and date of rank of 1 September 1988; and, that the memorandum, dated 16 June 1992, denying his request for reenlistment, be declared void and removed from his records. It was further directed that the applicant be provided supplemental consideration for promotion to the grade of master sergeant for all appropriate cycles beginning with cycle 93A7. (A copy of the Memorandum for the Chief of Staff and the Record of Proceedings (ROP), dated 8 August 1994, is attached at TAB 1).

Applicant was considered for promotion to the grade of master sergeant by supplemental consideration for the 93A7, 94A7 and 95A7 cycles and not selected.

Applicant was subsequently released from active duty on 31 May 1995 and retired effective 1 June 1995 under the provisions of AFI 36-3203 (Voluntary Retirement: Maximum Service or Time In Grade) in the grade of technical sergeant. He served 20 years and 18 days of active military service.

AIR FORCE EVALUATION:

The Chief, Military Justice Division, Air Force Legal Services Agency, AFLSA/JAJM, states that there is no indication, beyond a bare statement from the applicant in this application, that he did, in fact, dispute the validity of the debt which formed the basis for the Article 15 prior to filing a petition for bankruptcy. Petitioning a Bankruptcy Court for discharge from a debt is logically inconsistent with the position that such debt is not properly due and owing unless the request for discharge from that debt is incidental to a request for discharge from other debts also listed in the bankruptcy petition. Assuming that the applicant did dispute the debt at the relevant time, however, AFLSA/JAJM has no indication that applicant apprised the commander who imposed the Article 15 of such dispute.

Testimonial information gathered from an accused who has not been informed of his Article 31 rights can properly be the basis of nonjudicial punishment under Article 15. Article 31 applies to evidence gathered for use in a court, not to evidence used in nonjudicial punishment proceedings. There are no legal errors requiring corrective action. The Article 15 and resulting

punishment were properly executed and legally sufficient. They recommend applicant's request be denied.

A copy of the Air Force evaluation is attached at Exhibit C.

The Superintendent, Military Testing Section, HQ AFPC/DPPPWE, states that with regard to the promotion testing study time and receipt of study material, the time frames apply in most cases and obviously don't apply in situations where the BCMR directs supplemental promotion consideration. AFI 36-2605 directs testing 30 days after notification for individuals who become eligible unexpectedly as a result of BCMR action. In this case, the applicant was tested 30 days after notification. The fact that his commander took eight days to sign a letter recommending the applicant for promotion should not have impacted the applicant's study time. If it did, the applicant should have requested rescheduling of the test date. There is no mention of such a request in this package.

The October 1994 Notification of Automatic Order for Weighted Airman Promotion System (WAPS) Career Development Course (CDC) Material mentioned by the applicant was advising that Specialty Knowledge Test (SKT) material for the upcoming testing cycle 95E7 was being ordered for him. The output of that product was erroneous since the applicant was not eligible for the 9537 cycle due to his High Year of Tenure (HYT). One of the problems with the program in 1994 was its failure to properly screen out ineligible members. This is probably why the applicant received an erroneous notification. In summary, the applicant was treated fairly and consistently with others in his situation concerning study time and availability of study materials.

A complete copy of the Air Force evaluation is attached at Exhibit D.

The Chief Inquiries/AFBCMR Section, Enlisted Promotion Branch, HQ AFPC/DPPPWB, states that the applicant doesn't believe that he was provided fair and equitable promotion consideration because he was considered for three promotion cycles with the score of the Promotion Fitness Examination (PFE) he was administered on 7 November 1994. Because the applicant was not on active duty between 10 July 1992 and 7 June 1993 he had the option of being considered with both the PFE and the SKT or considered with the PFE only. He chose to be considered with only the PFE. When promotion testing begins for one cycle, tests for the previous cycle are destroyed as the Air Force does not administer obsolete tests to members competing for promotion. When the applicant tested on 7 November 1994, he took revision 26 which was applicable to the 95A7 cycle. In keeping with established

policy, the results of this test were use in his promotion consideration for the 95A7 cycle as well as the 94A7 and 93A7 cycles.

with regard to applicant's claim that AFPC/DPPPW was incorrect that applicant was not eligible for promotion until the 93A7 cycle, the applicant was promoted to technical sergeant with a date of rank and effective date of 1 September 1988. He was ineligible for the 90A7 and 91A7 cycles because he did not have the required time-in-grade. The BCMR voided a vacation of suspended reduction to senior airman which restored his grade to technical sergeant. However, it did not void that portion of the Article 15 punishment which called for a suspended reduction and the applicant was automatically ineligible for promotion consideration.

Applicant was considered for all promotion cycles he was eligible for in accordance with the policies and procedures appropriate during the time frame and was not selected. The fact that policies may change had no bearing on the applicant's previous supplemental promotion consideration as he believes. The policy applicant is referring to was approved based on a recommendation made by the Enlisted Evaluation System (EES) Review Group in 1995 and implemented for members who began testing in 1997. This policy was not applicable nor appropriate for the applicant's previous promotion considerations. They recommend applicant's request be denied.

A complete copy of the Air Force evaluation is attached at Exhibit E.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Copies of the Air Force evaluations were forwarded to the applicant on 24 November 1997 for review and response within 30 days. As of this date, no response has been received by this office.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely filed.
3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. After

a thorough review of the evidence of record and applicant's submission, we are not persuaded that he should be promoted to the grade of master sergeant, with a date of rank prior to his retirement, or, that the Article 15, dated 3 March 1992, should be set aside and removed from his records. His contentions are duly noted; however, we do not find these uncorroborated assertions, in and by themselves, sufficiently persuasive to override the rationale provided by the Air Force. Applicant's concern that he was not provided sufficient study time before being required to test for supplemental promotion consideration is appropriately addressed by the HQ AFPC/DPPPWE advisory. The regulation directs testing 30 days after notification for individuals who become eligible unexpectedly as a result of an AFBCMR action. The applicant stated that his commander took eight days to sign a letter of recommendation for promotion. However, the applicant could have requested rescheduling of his test date. Therefore, we believe applicant was treated fairly and we do not believe a direct promotion would be appropriate. With regard to applicant's request to set-aside the Article 15 action, the commander who imposed the Article 15 is expressly permitted to consider any relevant evidence, not just evidence which would be admissible before a court-martial, when deciding whether to impose nonjudicial punishment under Article 15. Applicant states that he did dispute the validity of the mortgage debt upon which the Article 15 was founded. As stated by AFLSA/JAJM, they have no indication that the applicant did dispute the validity of the debt at the relevant time or that he informed his commander of such a dispute. In reviewing the applicant's records, no evidence has been found to indicate any such dispute. We therefore agree with the recommendations of the Air Force and adopt the rationale expressed as the basis for our decision that the applicant has failed to sustain his burden that he has suffered either an error or an injustice. Therefore, we find no compelling basis to recommend granting the relief sought.

THE BOARD DETERMINES THAT:

The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

The following members of the Board considered this application in Executive Session on 25 August 1998, under the provisions of AFI 36-2603.

Mrs. Barbara A. Westgate, Panel Chair
Ms. Olga M. Crerar, Member
Ms. Patricia D. Vestal, Member

The following documentary evidence was considered:

- Exhibit A. DD Form 149, dated 12 Aug 97, w/atchs.
- Exhibit B. Applicant's Master Personnel Records.
- Exhibit C. Letter, AFLSA/JAJM, dated 10 Sep 97.
- Exhibit D. Letter, HQ AFPC/DPPPWE, dated 27 Oct 97.
- Exhibit E. Letter, HQ AFPC/DPPPWB, dated 3 Nov 97.
- Exhibit F. Letter, AFBCMR, dated 24 Nov 97.


BARBARA A. WESTGATE
Panel Chair